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NO. 86-419

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

ERNEST S. PATTON, RONALD J. MARKS,
J. HARVEY BELL and WILLIAM HARRISON,
Petitioners

v.

GREGORY S. SOURBEER,
Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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25 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES	PAGE
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)	3
Butz v. Economou, 438 U.S. 478 (1978)	3
Creighton v. City of St. Paul, 766 F.2d 1269 (8th Cir. 1985), certiorari granted sub nom. Anderson v. Creighton, No. 85-1520 (June 20, 1986)	2, 3, 18, 19
Davis v. Scherer, 468 U.S. 183 (1984)	7, 8
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	passim
Hewitt v. Helms, 459 U.S. 460 (1983)	5, 11
Malley v. Briggs, No. 84-1586 (March 5, 1986)	7, 8 13
Mitchell v. Forsyth, No. 84-335 (June 19, 1985)	7, 10, 12, 13
People of Three Mile Island v. NRC, 747 F.2d 139 (3d Cir. 1984)	18
Scheuer v. Rhodes, 416 U.S. 232 (1974)	10

TABLE OF AUTHORITIES
(Continued)

CASES PAGE

Whitley v. Albers, No. 84-1077
(March 4, 1986)..... 19

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ARGUMENT

I. A. In the petition for writ of certiorari, we presented to the Court the reasons why the Court of Appeals' broad formulation of the qualified immunity standard in actions under 42 U.S.C. § 1983 does not comport with recent decisions of this Court and demonstrates a conflict with approaches to immunity taken by other Courts of Appeals in the wake of Harlow v. Fitzgerald, 457 U.S. 800 (1982). In opposition to the petition, respondent Sourbeer asserts that this "is an unremarkable case involving well-established legal principles" which does not present an important question of federal law. (Resp. Br. p. 5) Apparently, however, this Court does not agree

with respondent since it has granted certiorari to review a case similar to this one: Anderson v. Creighton, No. 85-1520 (certiorari granted June 30, 1986). The question upon which certiorari has been granted in Anderson v. Creighton is as follows:

> When the general legal rule relevant to the constitutionality of an official's behavior makes reference to the circumstances of the particular case, is the qualified immunity provided by Harlow overcome by a mere showing that the general legal rule was well established, or must the court further determine that the official could not have reasonably believed that his own conduct was lawful in light of the facts and circumstances as they reasonably appeared to him.

Anderson v. Creighton, No. 85-1520 (Pet. for Writ of Certiorari, p. i, filed March 14, 1986), noted at 54 U.S.L.W. 3718.

While Anderson v. Creighton is an action brought against a federal official directly under the Constitution pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the official there moved for summary judgment on Harlow immunity grounds. See Creighton v. City of St. Paul, 766 F.2d 1269, 1271 (8th Cir. 1985). This Court repeatedly has stated that there is no logical basis for distinguishing between the immunity standard for federal officials in actions under Bivens and the immunity standard for state officials in actions under 42 U.S.C. § 1983. See Harlow v. Fitzgerald, 457 U.S. at 818 n. 30, Butz v. Economou, 438 U.S. 478, 504 (1978).

Therefore, at the very least, this petition for writ of certiorari should be held pending the Court's decision in Anderson v. Creighton. In any event, respondent is simply in error when he suggests that the Third Circuit's broad formulation of the immunity standard does not present an important question warranting review by this Court.

B. As the Eighth Circuit had done in Anderson v. Creighton, the Third Circuit here concluded that the mere existence of a general legal principle--in this case, due process--was sufficient to place petitioners on notice that their periodic reviews of Sourbeer's administrative segregation status in 1976-77 violated a clearly established right to specific, detailed

reviews. Our arguments in the petition that the law of prisoner due process was in a state of flux in 1976-77, and therefore Sourbeer's right was not "clearly established" within the meaning of Harlow, are amply supported by the fact that this Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983), was the first time the Court had held that internal prison regulations, like those at issue here, created a protectible liberty interest requiring procedures before an inmate could be placed or continued in administrative segregation status in a state prison.[1] Our

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[1]In no less than thirteen places in his brief, Sourbeer refers to his administrative segregation status as "isolation" or being housed in an "isolation cell." This is a clear misstatement of the record. The cellblock in which he was housed was one of

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position is met by a simplistic response from Sourbeer to the effect that, in his view, it has been clear from the early 1800's that individuals are protected by the Due Process Clause "from the arbitrary exercise of the powers of government." (Resp. Br. p. 12) Respondent's argument clearly begs the central question in this case.

(FOOTNOTE CONTINUED)

several nearly identical blocks at the prison--tiers of cells back-to-back facing a group of windows. (Court of Appeals app. 150a, 102a) While his freedom of movement around the institution was restricted, he was not "isolated" either from other inmates or staff, and was permitted privileges not inconsistent with his status. (Pet. App. 97a)

When faced with a claim of Harlow immunity from a state official, the duty of a court is to evaluate the "objective reasonableness of [the] official's conduct, as measured by reference to clearly established law." Harlow, 457 U.S. at 818. The Court's decisions in Davis v. Scherer, 468 U.S. 183 (1984), Mitchell v. Forsyth, No. 84-335 (June 19, 1985), and Malley v. Briggs, No. 84-1586 (March 5, 1986), make clear that the existence of a broad, general legal principle is, at best, only the starting point in a proper immunity analysis. Indeed, in Davis, even though it was acknowledged that a discharged public employee was entitled to "some kind of hearing," the Court determined that the defending officials were entitled to immunity

because previously "the Court had not determined what kind of a hearing must be provided" or "specif[ied] any minimally acceptable procedures for termination of employment." 468 U.S. at 192 n. 10.

Similarly, in Malley v. Briggs, the Court reaffirmed that a police officer is entitled to immunity for an arrest based on a warrant "if [he] acted in an objectively reasonable manner," which can only be resolved by a reference to the facts and circumstances confronting the official. Slip op. at 5. Accordingly, both Davis and Malley demonstrate that the existence of a generalized legal standard, such as that advocated by respondent here, does not resolve the qualified immunity question. Instead, as this Court has made

clear, the appropriate immunity analysis requires an examination of whether it was objectively reasonable for the executive official to have known that he would be found liable. As the dissent below properly noted, it cannot be objectively reasonable to hold petitioners liable when to do so requires an extension by implication of three narrow holdings of the Court of Appeals, none of which addressed the peculiar circumstances of Sourbeer's facts, and all of which were based upon a legal analysis subsequently determined to be incorrect by this Court. (Pet. App. 83a-86a).

If respondent is correct, Harlow becomes a standardless test. If immunity can be denied simply because there exists a general legal principle

such as "due process," then the danger of "hindsight-based reasoning," which was specifically rejected in Mitchell v. Forsyth, is apparent.

Our position that a broad view of "clearly established" is not consistent with this Court's decisions is fully supported by the policies underlying Harlow immunity. "Implicit in the idea that officials have some immunity-- absolute or qualified--for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." Scheuer v. Rhodes, 416 U.S. 232, 242 (1974). For this reason, respondent's insistence upon reiterating that petitioners erred

in retaining Sourbeer in segregation makes no sense. Even assuming they were mistaken in deciding to retain a 15-year-old, unsentenced, first-time offender in segregated custody away from the more sophisticated general inmate population, and even assuming the courts below applied the correct standard in evaluating the substance of the decisions to retain him, the issue for purposes of Harlow immunity is not whether the officials erred in their judgment; the issue is whether Sourbeer's right to detailed periodic reviews was clearly established before Hewitt v. Helms, 459 U.S. 460 (1983).[2]

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[2]In this regard, respondent's characterization of our argument, to the effect that we simply disagree with the holding that prison officials must conduct regular periodic reviews of a

(FOOTNOTE CONTINUED ON NEXT PAGE)

Moreover, the invocation of such broad phrases as "due process" or "equal protection" does not provide sufficient guidance to middle management executive officials like petitioners, even where it is established that inmates are, as a general matter, entitled to invoke the phrases. If this is the "clearly established" standard which respondent suggests the Court of Appeals properly has adopted, it is apparent that the Harlow immunity defense

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(FOOTNOTE CONTINUED)

segregated inmate, is a clear misstatement of our position. Obviously, after Hewitt v. Helms, such periodic reviews are required by due process. The issue is not whether such reviews are required, but whether it was objectively reasonable in 1976-77 that the kind of detailed reviews found to be necessary in this case were clearly required by the state of the law of prisoner due process at that time. Mitchell v. Forsyth, Slip op. at 23.

would be lost in cases even where there is a "legitimate question," Mitchell v. Forsyth, slip op. at 23 n. 12, or a "reasonable...disagree[ment]" among officials, Malley v. Briggs, slip op at. 5. Under these circumstances, all the dangers Harlow was designed to avoid would be resurrected. Clearly, this cannot be correct.

C. In what only may be described as a disingenuous attempt to persuade the Court not to reach the merits of petitioners' arguments on the Court of Appeals' erroneous formulation of the Harlow standard, respondent suggests (Resp. Br. pp. 11-21) that we have waived our right to argue that the Third Circuit has misapplied this Court's immunity decisions. Nothing could be further from the truth.

As the record discloses, petitioners specifically moved for summary judgment on Sourbeer's procedural due process claims based on Harlow immunity (Pet. App. 24a, 140a), moved the District Court for reconsideration of its refusal to grant immunity on these claims (Pet. App. 140a), renewed the argument in post-trial briefing before the District Court (Defendants' Post-Trial Memorandum filed Feb. 14, 1985, pp. 6-8), and specifically raised and briefed the issue in the Court of Appeals (Brief for Appellants field June 24, 1985, pp. 13-15 and 20-25; Reply Brief for Appellants/Cross-Appellees filed Aug. 26, 1985, pp. 15-25), including the filing of a petition for rehearing in banc (Pet. App. 3a) which

four judges of the Court would have granted. (Pet. App. 1a-2a) Obviously, there has been no waiver.

What respondent erroneously suggests is that, since we failed to persuade a majority of the panel below of our theory on the merits--that there is a distinction between the substance of a decision to segregate an inmate and the procedures required to place and retain an inmate in segregation (Pet. App. 37a)-- we therefore have waived our right to argue that Harlow immunity was improperly denied on respondent's procedural due process claim. To date, no court in this litigation has found a waiver, and the record simply discloses none. At worst, we failed to distinguish sufficiently for the panel the

difference between the substantive decision to place an inmate in segregation and what is required by due process in deciding to retain him there. (Pet. App. 51a)[3] Thus, there is no barrier to the Court's considering our immunity arguments.

II. A. In opposition to petitioners' suggestion in the petition that the Courts of Appeals have adopted inconsistent approaches to the proper application of the Harlow immunity standard, respondent makes no attempt to distinguish the cases we have cited or otherwise to demonstrate that the cases

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[3]Our briefs filed in the Court of appeals did distinguish between the process due for the initial placement in segregation and the process due upon periodic review of the segregation. The panel majority, however, did not accept the basis for our argument.

fail to indicate an inconsistency. Instead, respondent simply asserts that the best evidence for finding no conflict among the Circuits is the mere fact that no Circuit--other than the Third, of course--has expressly noted the inconsistent approaches. This argument apparently is premised upon the notion that, if no other court expressly mentions the presence of an inconsistency, there need be no further analysis by this Court to determine if, in fact, there is an inconsistency. Respondent's argument obviously is not correct.

B. Rather than being based simply upon a law review article, as suggested by respondent (Resp. Br. p. 13), our position that there has been an

inconsistency in approaches is amply reflected by the Third Circuit's express recognition of the inconsistency in People of Three Mile Island v. NRC, 747 F.2d 139, 144 (3d Cir. 1984), the decision which formed the basis for the broad immunity standard below, as well as by several decisions from other Courts of Appeals, some of which were cited in People of Three Mile Island. (Pet. pp. 29-31) The inconsistency of approaches is further illustrated by Creighton v. City of St. Paul, 766 F.2d 1269 (8th Cir. 1985), certiorari granted, No. 85-1520 (June 30, 1986). As we noted above, in Creighton the Court of Appeals refused to afford a federal official immunity in a civil rights action on the ground that the general principle at issue --a warrantless search of a residence in the absence

of exigent circumstances-- was well-settled and there was no need to inquire as to whether the official's belief in the lawfulness of his actions was "objectively reasonable." 766 F.2d at 1277. As also noted, the Court has granted certiorari in Creighton upon the petition of the Solicitor General of the United States.[4] Accordingly, review in this case is warranted because of this inconsistency among the Circuits. At a minimum, the petition should be held pending the Court's decision in Creighton.

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[4]Besides Anderson v. Creighton, the Court also recognized the significance of this issue in Whitley v. Albers, No. 84-1077 (March 4, 1986), but the Court there did not reach the question, having resolved the case on other grounds. Slip op. at 15.

CONCLUSION

For these reasons, and the reasons expressed in the petition for writ of certiorari, the petition should be granted and, upon review, the decision of the Court of Appeals should be reversed with directions to enter judgment for petitioners.

Respectfully submitted,

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